



**SOCIAL DEMOCRATIC and LABOUR PARTY
SUBMISSION TO
“INDEPENDENT REVIEW of HUMAN RIGHTS
ACT.”**

MARCH 2021

PART ONE – INTRODUCTION

In responding to the consultation the SDLP submission has nine parts. The SDLP wish to make four introductory comments.

“NEITHER WELCOME NOR TIMELY”

First, in their submission to the “Independent Human Rights Act Review” (“the Review”) the QUB Human Rights Centre states that:

“with the greatest respect, we consider your Review to be neither welcome nor timely,”

The SDLP concur with this view and would go further.

A STUNNING OMISSION

Second, the terms of reference of the Review are neither “Agreement proofed” nor show regard for the particular circumstances of Northern Ireland (“NI”). This is a stunning omission. The terms of reference do recognise that the HRA is protected under the devolution settlements but goes no further.

As detailed in this submission, the SDLP consider it revealing that the British Government can commission a review of the Human Right Act (“HRA”) but in doing so fail to acknowledge the particular reasons, inter-alia, to apply a NI prism to that work. This is explained further in this submission.

PRESUMPTION

Third questions raised through the terms of reference of the review convey, by design or not, a sense of presumption, inviting the

respondents to head in certain directions. The concern arises that on the far side of the Review this could play to it a partial political agenda not the wider public interest.

The SDLP believes that to mitigate this risk the answer to such questions and the conclusions of the Review should to deny the former and promote the latter.

THE REGIONS

Fourth in this submission, the SDLP comments on the Review in the context of NI and Ireland. However, arising from conversations with other parties representing the devolved regions and with parties with membership of the House of Commons, the SDLP consider that this commentary broadly reflects concerns raised by many in the four regions.

PART TWO – A FLAWED REVIEW

The SDLP consider the Review flawed in its creation. The SDLP hope that the Review will not be flawed in its conclusions. A number of observations on the flawed genesis of the Review arise.

First, the establishment of the Review cannot be divorced from the political context that has seen its birth. That context includes a malign euro-scepticism with possible repercussions for the Human Rights Act (“the HRA”).

The Review intends to report by the summer of 2021. In doing so the Review may land in the middle of post-Brexit tensions, visible in the early days of the Protocol with more contested issues lining up. It is entirely feasible that in this context, later in the year, the Review will become a new battleground for “malign euro-scepticism.”

Second, while the Review is considering the operation not the content of the HRA, this differentiation may prove problematic. In any case those who will consider and make decisions arising from the Review may not be reliable in their respect for such differentiation.

Third while it is asserted that the Review and the questions shaped by its terms of reference are “neutral”, it is the view of the SDLP that there is “a presumptive narrative” for example conveyed by the references to “amendment” and “change” in certain questions posed. This is particularly in relation to Theme Two.

Fourth the terms of reference of the Review are silent on the fact that, arising from the Good Friday Agreement, there is a particular constitutional and political settlement in NI with the HRA/ECHR a fundamental feature of that political order. At a British Government level this silence is stunning though not surprising. In any case, it cannot be simply ignored.

What should also be noted is that the Review in its call for evidence panel has not given due recognition to this settlement. Some might argue that the absence of a narrative around the particular circumstances of NI (including the rights provisions of the Good Friday Agreement and the Northern Ireland Act 1998, the rights requirements governing the conduct of the NI Assembly, Executive and Ministers and the still unaddressed rights ambitions of the Good Friday Agreement) is such a significant oversight that it raises issues about the validity of the Review ab initio.

Fifth and further to the fourth point above, the review was initiated without reference to the Irish Government, with a seeming disregard for the responsibility of the London and Dublin administrations as joint-guarantor of the Good Friday Agreement and the rights

provisions and commitments that arise thereunder. This disruptive unilateralism is evident in other area of the life of this British Government and is commented upon further in this submission.

Sixth the review fails to acknowledge that in a region of the Union, a conflict has existed for centuries and in recent decades, inter-alia, around national and human rights. As explained further in this submission the SDLP consider issues of and disputes over law, order and justice fuelled the conflict. Democratic Ireland faced these issues and disputes and went about the work of resolution in democratic ways.

However, the absence of comment on the rights context in NI – in the terms of reference or themes 1 and 2 - does not create confidence.

PART THREE – “ISSUES OF LAW, ORDER AND JUSTICE”

The late Queens University teacher, Frank Wright, once commented that:

“National conflicts, once fully developed, revolve around issues of law, order and justice.”

The SDLP is strongly of the view that this conveys certain essential features of the years of conflict in Northern Ireland and the causes of conflict. Human rights abuses – by state policing and security agencies and illegal anti-democratic militias – were of a huge scale.

Issues of “law, order and justice” became the fuel of conflict. The SDLP submits that in the conduct of its review, the panel should be fully cognisant of this perspective.

To develop this point further. In the late 1960s discrimination in housing and employment, gerrymandering and denial of one person/one vote, the treatment of the Irish identity, the existence and operation of unjust laws, other rights and social justice issues were often the visible expressions of conflict. Through democratic activism some of those issues began to be addressed, others endured.

In the view of the SDLP, it is essential that this narrative is acknowledged by the Review in its deliberations and conclusions. In doing so the centrality of rights issues in the conflict, the requirement for a rights-based approach to conflict resolution and appropriate intervention by the courts on rights issues may be better appreciated. In this way the assertions of the SDLP that the Review is not timely, not welcome and not proofed against the particular circumstances of NI might be at least acknowledged with a message therein not to unpick what has been so carefully crafted.

If this narrative is not fully recognised then the Review might operate on a problematic basis, head in directions in tension with the rights-based approach and its oversight which is such a pivotal part of the management and resolution of conflict in NI.

RIGHTS and 1998

The core character of the conflict was one of the two traditions – the British and Irish identities respectively – with a core character of the resolution of that conflict was in the accommodation of the two traditions. This was the wonder of the Good Friday Agreement (“the Agreement”) which affirmed the equal legitimacy of the two traditions, their respective aspirations and promoted their accommodation in agreed NI, North-South and British-Irish institutions.

However the Agreement was much more than a political, constitutional and institutional compact. The Agreement addressed in a more comprehensive way than before the “issues of law, order and justice” around which conflict revolved. The Agreement detailed four responses:

- the creation of an Independent Commission on Policing (“Patten”) to address what was considered the most intractable of law and justice issues.
- the establishment of a Criminal Justice Review to consider far-reaching change to the administration of justice including the appointment of the judiciary and the work of the Prosecution Service.
- the creation of independent Human Rights Commission and Equality Commission respectively

There were other provisions and declarations in relation to prisoners, parity of esteem and identity though tragically few commitments on the rights of victims and survivors and the requirements of justice, truth, accountability and acknowledgement.

In the reports that followed, the reforms that flowed and the subsequent conduct of relevant commissions and agencies, the requirements of human rights, the ECHR and other rights codes and conventions are (or are meant) to be central and have been properly and proportionately safe-guarded by the NI High Court.

The provisions of the Agreement directed all of this work with full regard to “the particular circumstances of NI.” The rights-based approach was a foundational pillar of the content of the Agreement and the institutional and sectoral structures it promoted.

It is the unfortunate nature of NI politics that rights issues, during the conflict, since and now, can be reduced to base political dispute. The

SDLP however strongly advises the Review to not put in doubt or in danger that which is the best of the new NI order of things. This point is of the highest political and practical importance.

In this context the SDLP wish to particular comment on policing to demonstrate in a representative way how a rights -based approach in law, policy, practice and oversight serves the interests of the people of NI.

PART FOUR – POLICING THE ROAD TRAVELLED.

A senior Irish Government official commented in the Autumn of 2020 that:

“the greatest achievement of the peace process was policing.”
(“Inside Accounts Vol. 2 Graham Spencer)

Such words can help to concentrate the mind (and it is submitted the particular thinking of the review) for it is widely agreed that “the new beginning to policing” imagined by the 1999 Patten Report has been a mighty achievement.

It should be recalled that the Patten Report put human rights centre-stage in its vision of policing saying:

“the fundamental purpose of policing should be, in the words of the Agreement, the protection and vindication of the rights of all.”
(paragraph 4.1)

The Report makes 9 recommendations on human rights (paragraphs 4.6-4.12) including “a comprehensive programme of action...a new oath with an explicit commitment to upholding human rights....a new Code of Ethics.....codes of practice strictly in accord with the

ECHR...appraisal against and training in the principles and standards of human rights...etc”

The SDLP believe that any consideration by the Review of human rights, their management and oversight, must consider for example the policing dimension in NI, how far the road has been travelled and the centrality of rights-based approach in doing so.

In this regard and by way of just one example the Review should consider and seek advice on how the NI High Court has been called upon to make judgment on multiple “legacy cases” involving state use of lethal force, questions of article 2 independence in police conducted criminal investigations, the good conduct of inquests, the promotion of the needs of victims and survivors etc.

Noting that these matters can be deeply contested at political and community levels, the High Court has been able to exercise its functions such that it is generally considered that the High Court has not acted beyond its competence, overreached in its interpretation, acting as a policy maker or otherwise improperly.

POLICING – THE ROAD YET TO TRAVEL.

The SDLP further submit that the review should be cognisant of the policing road yet to travel. It is vital that policing in particular and the rule of law in general is as robust as possible facing into and through the next phase of our history.

A complex and challenging vista is evolving with Brexit, the protocol, constitutional pressures, a NI census, Covid disagreement and domestic political disputes and other factors. Policing needs to be in the strongest place to help best manage whatever arises in the

future. The conclusions of the review could have a read across to the integrity and authority of human rights dimensions of policing.

It should be noted that policing in NI has faced its own struggles in recent times. The PSNI response to a recent paramilitary show of force in East Belfast, the PSNI response in South Belfast to a remembrance service for people murdered in the conflict, the PSNI advice and conduct around a large funeral in West Belfast during a Covid lockdown have raised issues around police judgment and authority. To chase a headline some have falsely claimed there is “a crisis of confidence in the police.”

The SDLP re-iterate that the Review must consider its work through a “Northern Ireland prism,” how a human rights based approach on policing and through the courts has served confidence and how any possible unpicking of any of this works through, now and over the next uncertain period.

PART 5 - UNFINISHED BUSINESS

There is much unfinished business on a rights-based approach. The Agreement stated that there should be consideration of a Bill of Rights in the “particular circumstances of NI” and a Charter of Rights across Ireland for party political endorsement. In addition and more positively there is a joint committee of the of the respective NI and Irish Human Rights Commissions to consider issues of mutual interest and an ad-hoc committee of the NI Assembly is now considering the question of a NI Bill of Rights.

It would be unfortunate if the Review was in some form to degrade or run interference around any of this.

PART 6 – THEMES ONE AND TWO

The SDLP have considered the QUB Human Rights Centre response to themes 1 and 2 and questions posed by the call for evidence by the Review. The SDLP accept in general terms the legal analysis of and technical commentary on those matters as detailed by the Human Rights Centre.

The SDLP also acknowledge, as does the Human Rights Centre, that there are differences of view around the determinations of NI courts on a small number of issues including article 2 requirements and areas of social policy. The difference of views must be genuinely respected.

In upholding the authority of the NI High Court in its stewardship of a rights-based approach and in arguing that an evidential basis to question its approach does not arise, the SDLP note that there are people who in good conscience think otherwise.

There are a number of matters that require emphasis including:

- the current NI High Court and its leaderships are sources of stability and authority arguably more than any other element of the criminal justice arrangements. One of the factors has been its contributions on human rights. This role, stretching back for some time, needs understood. The NI High Court is an exemplar not a rogue institution, arguably *the* institution of justice that, consistent with its responsibilities, serves the interests of the people of NI. The Review must tread warily in this regard.
- The duty to “take into account” ECtHR jurisprudence has been applied in appropriate ways noting the difference of views on the exercise of discretion and application of the margin of

appreciation. To amend section 2 with no account of ECtHR would be an unfortunate development.

- Judicial dialogue operates satisfactorily but there are times when those in other places with the responsibility to respond to the views of the court fail to do so. This is acute in relation to article 2 NI legacy criminal investigations including in relation to the murder of the lawyer Pat Finucane.
- The mendacity of the British Government statement of November 2020 should concentrate minds (including that of the Review) in this regard as should the SOSNI 18 March 2020 statement which seeks to short-circuit article 2 investigations. The SDLP consider that the Review should make reference to these concerns. If not, the Review may replicate the failure to acknowledge the particular circumstances of NI as in the creation of the Review.
- The SDLP agree that there have been no instances as referred to in Theme 2 (a)(i).
- It appears to the SDLP that the somewhat casual reference to repeal of section 3 referred to in Theme 2 (a)(ii) is unfortunate, does not build confidence and tends towards a leading question as is the reference to “retrospective.”
- “Incompatibility” is a trojan horse, The SDLP strongly advises against opening that door.
- HRA protection should apply equally to all including UK service personnel but no HRA derogations should be permitted for extra-territorial actions.

PART 8 “THE BLOODLINES OF ETHNICITY TO THE LIFELINES OF HUMAN RIGHTS”

The SDLP submits that there is a wider historical perspective that should inform the approach of the review panel. There is a transition

across the life of the island of Ireland, moving from a polity of “the bloodlines of ethnicity....to the lifelines of human rights.”

This is a defining feature of contemporary Ireland. It does not usurp legitimately expressed politics of identity or constitutional aspiration and difference still endures around the scope of right provisions. Nonetheless, there are new points of reference perhaps indeed a more common language and more shared ambition.

The SDLP would suggest to the review that there should be recognition that a rights narrative, relevant declarations, enforcement and adjudication have been an ally in the development of democracy across both parts of the island. The review should therefore caution itself not to upset the totality of this and the greater future reach of “the lifelines of human rights.”

The Review may reply that its work is not about HRA content but about operation. As outlined in this submission the SDLP is concerned that this demarcation is problematic.

In any case certain political interests - not least in what shall be a turbulent year in London/Dublin/Brussels/Belfast relations – may exploit the fact of and any conclusions of the Review for more narrow objectives. There will be people who will not be so respectful of the difference between content and operation of the HRA and will see in the existence of the Review “game-on” to do down the HRA.

The Irish Government established “A Shared Island Unit” which include dialogue on issues facing the people of Ireland. The SDLP has also established a “New Ireland Commission” to promote dialogue and interrogate the issues now faced and emerging in NI, on the island and the islands. An element of the work of the Commission is

to develop a new rights agenda to contribute to deepening the “lifelines of human rights.”

The SDLP request the Review to factor these wider matters into its thinking and conclusions.

PART 9 - UNILATERALISM and OVER-REACH

The SDLP considers that, in the NI context, the current London government is inclined to a disruptive unilateralism and political over-reach. These factors should be considered by the Review – for as one senior observer has noted: “If you give London an inch, they will take a mile.”

Unilateralism: On 18 March 2020, the British Government published proposals to address the legacy of conflict in NI. In doing so, it abandoned an agreement (Stormont House) between London and Dublin (including an international Treaty) and with the NI parties respectively. It did so without reference to the Irish Government or to victims and survivors in NI. In March 2021, it unilaterally extended trade “grace” periods arising from the Irish Brexit protocol, without reference to Dublin or Brussels, when it appeared progress was being made on this very issue.

There are other examples but the SDLP would argue that the point is clear. When it wishes, this London Government will act unilaterally with disregard for Treaty or legal obligations. The SDLP would request that the Review consider this in the conclusions it draws to moderate the risk of London mangling the review to indulge backbenchers, beat the euro-sceptic drum louder or otherwise being disruptive.

Over-reach: this London government has an inclination to take onto itself (or seek to take onto itself) significant powers damaging to established practices. The Internal Markets Bill has provisions that can see London acting over the heads of the devolved interests and for example determine “levelling-up” spend in a devolved region. (In this regard note the Report from the Scottish Government of 8 March on Brexit, the Internal markets Bill and the devolution settlement.) It also appears that an Election Integrity Bill is coming which it is believed would give government the power to issue strategic advice to the “independent” Electoral Commission.

There are other examples but the SDLP would argue that the point is clear. When it wishes this London Government, likes to take powers onto itself to better do its business as it deems fit with disregard for hard-won gains such as independent election regulation or the devolved settlements. The SDLP further considers that the review must be deeply vigilant of these matters.

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